IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
WARREN R. NELSON,	)	**Case No. 01-12016**
DEANNA M. NELSON,	)	**Chapter 7**
	)	
Debtors.	)	
	)	
	)	
THE CINCINNATI INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adversary No. 01-5269**
	)	
DEANNA M. NELSON,	)	
	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND OPINION

Deanna M. Nelson, debtor, seeks summary judgment on Cincinnati Insurance Company's ("Cincinnati Insurance") complaint to determine dischargeability under 11 U.S.C. § 523(a)(4) because Cincinnati Insurance's complaint was filed after the July 30, 2001 deadline for filing such complaints. Cincinnati Insurance contends that it is not barred by the July 30, 2001 deadline for filing complaints to determine dischargeability because it did not have notice or actual knowledge of the debtor's case. After careful review of the case, the Court determines that there remains a genuine issue of material fact as to whether Cincinnati Insurance received actual notice of the pendency of Mrs. Nelson's bankruptcy case. Therefore, debtor's motion for summary judgment is

DENIED.

UNCONTROVERTED FACTS

On June 4, 1997, Deanne M. Nelson, debtor, was appointed conservator for her two daughters, Chelsea and Lauren Orth, by the District Court of McPherson County, Kansas, Case Nos. 97 PR 3035 and 97 PR 3036, respectively. Cincinnati Insurance was surety for the Orth Conservatorships. Four years later, on April 4, 2001, McPherson County District Judge Carl B. Anderson appointed Stephen A. Hilgers as Special Guardian Ad Litem to investigate the inventory and accounts of the Orth Conservatorships. Mr. Hilgers petitioned the state court for review and an Order for Review was sent to Fee Insurance Group, the local insurance agency through which Cincinnati Insurance issued the surety bonds. Fee Insurance Group received the Order for Review on April 18, 2001, and faxed it to Cincinnati Insurance that same day. On April 23, 2001, Elizabeth Carley, a Supervising Claims Examiner with Cincinnati Insurance, sent a certified letter to Mrs. Nelson informing her that Cincinnati Insurance would seek restitution from her based on the terms of the surety bonds if Cincinnati Insurance was forced to become involved.

On May 2, 2001, Mrs. Nelson filed her Chapter 7 petition. The Court takes judicial notice that the Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadline was sent to creditors listed on the matrix provided by the debtor on May 3, 2001 through the Bankruptcy Noticing Center ("BNC") pursuant to L.B.R. 2002.1 which provides that notices served by the clerk are generally mailed by the BNC. See Docket No. 2. The Notice provided that the deadline to file a complaint objecting to discharge of the debtor was July 30, 2001. The BNC's certificate of service for the Notice indicates that the Notice was sent to Cincinnati Insurance at P.O. Box 145496, Cincinnati, Ohio 45250-5496 and to "Stephen A. Hilgers GAL" at P.O. Box 1244, McPherson, Kansas 67460. No Notices were returned to the Court by the Postmaster.

Additionally, the Court notes that debts to Cincinnati Insurance and to Hilgers were listed. Fee Insurance Group was neither listed, nor was notice sent to it.

On June 22, 2001, the McPherson County District Court made certain findings concerning the disposition of monies in the Orth Conservatorships. Specifically, the court found that two Farm Bureau Insurance policies had been cashed and paid out totaling almost $40,000. The court also found that several Certificates of Deposit were cashed and paid out totaling over $22,000. The court ordered that the debtor be subpoenaed to appear and testify on August 10, 2001 concerning the disposition of said funds. The court also ordered that Cincinnati Insurance be notified of the proceedings. Mr. Hilgers informed Elizabeth Carley at Cincinnati Insurance of the proceedings on June 26, 2001, but did not mention Mrs. Nelson's bankruptcy in the letter. July 30, 2001 was the last day of the Fed. R. Bankr. P. 4007 period in which to file a dischargeability complaint.

Cincinnati Insurance contends that it did not receive the notice of Mrs. Nelson's bankruptcy case until August 22, 2001, when Cincinnati Insurance's counsel, Teresa J. James, contacted debtor's attorney to inform him that it appeared that Mrs. Nelson had misused the conservatorship funds such that Cincinnati Insurance would be required to pay on the surety bonds and would seek indemnification from Mrs. Nelson. Ms. James advised Elizabeth Carley at Cincinnati Insurance of Mrs. Nelson's bankruptcy case on August 27, 2001.

According to the affidavits filed by Elizabeth Carley for Cincinnati Insurance, Jo Anna Leasure for Fee Insurance Group, and Cincinnati Insurance's attorney, Teresa James, none had knowledge of the bankruptcy case until after the July 30, 2001 deadline for filing complaints objecting to debtor's discharge. After learning of the bankruptcy, and in order to confirm that Cincinnati Insurance had never received notice of Mrs. Nelson's bankruptcy filing, Elizabeth

Carley checked her files regarding the Orth Conservatorships and traced the sources through which mail is received and routed throughout the claims department at Cincinnati Insurance. Cincinnati Insurance's files, records and employees show no evidence of receipt of notice of Mrs. Nelson's bankruptcy. Similarly, there is no evidence of receipt by Fee Insurance Group of Mrs. Nelson's bankruptcy notice. The record is silent with respect to what Steven Hilgers may or may not have received.

It is also noted that Mrs. Nelson's schedule F incorrectly lists the bond numbers for the Orth Conservatorship bonds as 1380-375829 and 1380-375828, instead of B80-375829 and B80-375828, respectively.

JURISDICTION

The Court has jurisdiction over this proceeding. 28 U.S.C. § 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

DISCUSSION

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment and is made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure. Rule 56, in articulating the standard of review for summary judgment motions, provides that judgment shall be rendered if all pleadings, depositions, answers to interrogatories, and admissions and affidavits on file show that there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. In determining whether any genuine issues of material fact exist, the Court must construe the record liberally in favor of the party opposing the summary judgment. McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988)(citation omitted). An issue is "genuine" if sufficient evidence exists on each side "so that a rational trier of fact could resolve the issue either way" and "[a]n

issue is 'material' if under the substantive law it is essential to the proper disposition of the claim." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998).

Because Cincinnati Insurance has honored its bonds to the Orth Conservatorships, Cincinnati is subrogated to the conservatorships' claims against Mrs. Nelson for fiduciary fraud or defalcation. Cincinnati Insurance's complaint asserts that Mrs. Nelson's debts should be excepted from discharge under §523(a)(4) which excepts debts incurred by the debtor by fraud or defalcation while acting in a fiduciary capacity from discharge. As Mrs. Nelson points out, §523(c) states that a debtor is discharged from debts such as those described by §523(a)(4) unless the creditor to whom the debt is owed requests its exception from discharge and, after notice and a hearing, the Court determines the debt to be excepted from discharge. Fed. R. Bankr. P. 7001(6) provides that actions to determine the dischargeability of a debt are adversary proceedings and Fed. R. Bankr. P. 7003 states that adversary proceedings are commenced by the filing of a complaint. Fed. R. Bankr. P. 4007(c) states that such a complaint must be filed not later than 60 days after the first date set by the Court for the first meeting of creditors under § 341. This time period may only be extended for cause and 30 days notice of the deadline itself must be given to all creditors and parties in interest. Fed. R. Bankr. P. 4007(c). According to Fed. R. Bankr. P. 9006(b)(3), the Court may only enlarge the 60 day period as set out in Fed. R. Bankr. P. 4007. It goes without saying that strict compliance with this deadline is required, numerous courts having held that the deadline is jurisdictional. "The time limits in Rule 4007(c) have been held to be jurisdictional and therefore nonwaivable . . . ." See 9 Collier on Bankruptcy, 15th Ed. Rev'd, ¶ 4007.04[1][a] (2001)(citing many cases including Burger King Corp. v. B-K of Kansas, Inc., 73 B.R. 671 (D. Kan. 1987)). Lack of receipt of the notice will not excuse a creditor from complying with the deadline where the creditor has actual knowledge of the bankruptcy in time to file a

dischargeability complaint. See 9 Collier on Bankruptcy, 15th Ed. Rev'd, ¶ 4007.04[2] (2001).

To grant summary judgment to the defendant, the Court must be able to find from the record at hand that there is no material dispute that Cincinnati Insurance received notice or had actual knowledge of the bankruptcy case. Cincinnati Insurance stipulates that the deadline for filing its complaint to determine dischargeability expired on July 30, 2001, and Cincinnati Insurance did not request an extension of the deadline as provided in Fed. R. Bankr. P. 4007(c). In its complaint, Cincinnati Insurance seeks to have its debt excepted from discharge under § 523(a)(4) which provides,

> (a) A discharge under section 727, 1141, 1228(a), (1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
>
> > (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

Although Cincinnati Insurance argues that Mrs. Nelson has not provided facts sufficient for this Court to determine that notice of the bankruptcy was served, the Court takes judicial notice of the official case file and finds that Mrs. Nelson has at least demonstrated that Cincinnati Insurance was mailed notice of her bankruptcy filing. "When mail is properly addressed, stamped and deposited in the mail system, there is a presumption it was received by the party to whom it was sent." In re American Prop., Inc., 30 B.R. 239, 243-44 (Bankr. D. Kan. 1983)(citations omitted). "Proof of custom of mailing is sufficient to carry the burden of proper mailing, and proof of customary and usual computer procedures is sufficient to show adherence to a usual and customary procedure." Id. at 244 (citations omitted). The Court takes judicial notice of its official case file in which BNC's certificates of service indicate that notice of Mrs. Nelson's bankruptcy and the Notice of Discharge filed October 15, 2001, were mailed to Cincinnati Insurance at its correct

address through the BNC. The file does not contain envelopes returned from the Postmaster which are addressed to Cincinnati Insurance. Mrs. Nelson is therefore entitled to the presumption that notices were prepared by the BNC, correctly addressed, mailed, and received by Cincinnati Insurance. This shifts to Cincinnati Insurance the burden to rebut the presumption. See In re Morelock, 151 B.R. 121, 123 (Bankr. N. D. Ohio 1992).

Cincinnati Insurance denies receiving notice of Mrs. Nelson's bankruptcy. "Denial of receipt does not, as a matter of law, rebut the presumption, but rather creates a question of fact." American Prop., 30 B.R. at 244 (citation omitted). Cincinnati Insurance does more than just deny receipt; it provides affidavits which describe standardized procedures used in processing the company's mail. Direct testimony denying receipt coupled with standardized procedures used in processing bankruptcy notices has been held to overcome the presumption of a notice's receipt. See Shawnee State Bank v. First Nat'l Bank of Olathe (In re Winders), 201 B.R. 288, 291 (D. Kan. 1996). The Cincinnati Insurance affidavit describes its method of processing mail. In addition, there appear to have been at least two hearings in state court between Mrs. Nelson's filing of this bankruptcy case and the July 30 deadline. Thus, there were several opportunities for Mrs. Nelson to personally inform the Guardian Ad Litem or the McPherson County District Court of the pendency of this bankruptcy before the deadline ran. This lack of notice is further supported by the affidavits of Fee Insurance and attorney Theresa J. James.

When the Court views this record and construes it liberally in favor of Cincinnati Insurance, it can only conclude that the plaintiff has raised issues of material fact with respect to its having received actual notice or having knowledge of the bankruptcy case. Cincinnati Insurance and Fee Insurance Group's affidavits, combined with the hearing opportunities at which the debtor apparently kept silent about this filing and the erroneous account numbers listed in

debtor's schedules, leave factual issues which preclude summary judgment. Although the Court questions why Cincinnati Insurance did not have actual notice of Mrs. Nelson's bankruptcy through contact with Mr. Hilgers (who also received notice of the bankruptcy case), the Court finds that Cincinnati Insurance has raised a question of fact sufficient to overcome summary judgment as to whether it received notice or had actual knowledge of Mrs. Nelson's bankruptcy case in time to object to the discharge of its debt.

Deanna M. Nelson's Motion for Summary Judgment is DENIED. The Clerk shall set this matter for pretrial scheduling conference and counsel are advised to proceed with a planning meeting pursuant to Fed.R.Bankr. P. 7026 and F.R.Civ. P. 26(f).

IT IS SO ORDERED this 26th day of February, 2002.

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ROBERT E. NUGENT, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the **Memorandum and Opinion** was deposited in the United States mail, postage prepaid on this 26th day of February, 2002, to the following:

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